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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1953.

No. [redacted]71
Criminal.

JOSEPH W. CLARK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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INDEX.

	Page
Petition for writ of certiorari	1
Opinions below	2
Statement of the grounds on which the jurisdiction of this Court is invoked	2
Questions presented for review	2
Constitution, statute and rules involved	4
Statement of the case	6
Argument	13
I.	
It is prejudicial error and a violation of petitioner's rights under the Fifth and Sixth Amendments to the Constitution for the government to attempt to prove that an alleged income tax evasion was committed in a manner distinct and different from that alleged in the indictment, where the indictment described the particular manner in which the alleged income tax evasion was committed	14
II.	
The admission of unofficial, unsigned documents (Exhibits 18 and 19) of the Office of the License Collector of the City of St. Louis, to prove the amount of gross business done by the petitioner, and in violation of his rights under the Sixth Amendment to the Constitution	22

III.

The admissibility of Exhibits 6 and 7 (consent to waiver of restrictions on assessment and collection of deficiency in tax, on Form 870, U. S. Treasury Department), held by the Court of Appeals to have been erroneous, affected substantial rights of the petitioner and was prejudicial to his rights to a fair and impartial trial under the Sixth Amendment to the Constitution 25

Conclusion 30

Prayer 31

Authorities Cited.

Berger v. United States, 55 S. Ct. 629, 295 U. S. 78, 79 L. Ed. 1314..... 27

Brown v. United States (C. C. A. 8), 146 Fed. 219.... 30

Bryan v. United States (C. A. 5), 175 Fed. (2) 223..17, 30

Kirsch v. United States (C. A. 8), 174 Fed. (2) 595... 20

Kotteakos v. United States, 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575.....13, 27, 30

Kutler v. United States (C. C. A. Pa., 1935), 79 Fed. (2) 440 16

Little v. United States (C. C. A. 10), 73 Fed. (2) 861.. 25

Naftiger v. United States (C. C. A. 8), 200 Fed. 494.. 15

Rice v. United States (C. C. A. 10), 149 Fed. (2) 601.. 25

United States v. Denny (C. C. A. 7), 165 Fed. (2) 668, cert. denied 333 U. S. 844.....16, 30

United States v. Fenwick (C. A. 7), 177 Fed. (2) 488 .....20, 30

United States v. Link (C. A. 3), 202 Fed. (2) 592.... 19

Constitution and Statutes Cited.

Article V, Amendments to Constitution of the United States 4, 14, 22, 25, 30
Article VI, Amendments to Constitution of the United States 4, 14, 30
Section 22 of the Internal Revenue Code..... 12
Section 145 (b), Title 26, U. S. C..... 2, 5, 6
Section 1254 (1), Title 28, U. S. C..... 2

Rules Cited.

Rule 7 (c) of the Federal Rules of Criminal Procedure, 18 U. S. C. A..... 5, 14
Rule 23 (c) of the Federal Rules of Criminal Procedure, 18 U. S. C. A..... 8, 28, 29
Rule 37 (b) of the Federal Rules of Criminal Procedure 2
Rule 52 (a) of the Federal Rules of Criminal Procedure, 18 U. S. C. A..... 5, 8, 27

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To the United States Court of Appeals for the Eighth Circuit.

Your petitioner, Joseph W. Clark, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on March 19, 1954, affirming the judgment of conviction of petitioner of income tax evasion in the appeal therein pending numbered 14,652, wherein your petitioner was appellant and the United States of America was appellee. The said judgment became final on April 12, 1954, when the said Court, without opinion, denied petitioner's petition for a rehearing (R. 323). A certified transcript of the printed portion

of said record in said case, including the proceedings and opinion in the said Court of Appeals has been filed in this Court.

OPINIONS BELOW.

There was no written opinion in the District Court.

The opinion of the United States Court of Appeals for the Eighth Circuit (Johnsen and Collet, Circuit Judges, and Nordbye, District Judge) in this case has not been reported, and is printed at page 306 of the record herein. Denial of rehearing was without opinion.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Petitioner was convicted of income tax evasion, a felony, under **Section 145 (b) of Title 26, U. S. C.** The judgment and opinion of the Court of Appeals affirming Petitioner's conviction was entered March 19, 1954 (R. 315). A petition for rehearing pursuant to the rules of the Court of Appeals was timely filed on April 5, 1954 (R. 317); said petition was denied, without opinion, on April 12, 1954 (R. 323), at which time the judgment became final. The Court of Appeals has stayed the issuance of its mandate pending this proceeding (R. 324). This petition for certiorari is filed within thirty days thereafter, and within the time provided by **Rule 37 (b) of the Rules of Criminal Procedure.** Jurisdiction to review the judgment of the Court of Appeals is conferred on this Court by **Title 28, U. S. C., Section 1254 (1).**

QUESTIONS PRESENTED FOR REVIEW.

(1) Where an indictment returned by the Grand Jury, charging a defendant with income tax evasion **[Section 145 (b), Title 26, United States Code]**, describes the par-

ticular manner in which the alleged income tax evasion was committed, it is not prejudicial error for the government to attempt to prove that the alleged income tax evasion was committed in a manner distinct and different from that alleged in the indictment itself.

(2) Where an indictment returned by the Grand Jury charges that a defendant evaded income taxes by understating his "Gross Receipts," accepting "Costs of Goods" and "Business Deductions" correct as shown on the return, is the Fifth Amendment to the Constitution, guaranteeing a defendant accused of crime with a presentment or indictment by Grand Jury, violated by proof of overstatement of "Cost of Goods" and "Business Deductions."

(3) Does a defendant accused of income tax evasion by indictment have the burden of proving the correct Adjusted Gross Income where the indictment returned by the Grand Jury determines that the manner of such income tax evasion was committed solely by understatement of "Gross Receipts"?

(4) When a consent to a Waiver of Restrictions on Assessment and Collection of Deficiency of Tax (on Form 870 of the U. S. Treasury Department) (Govt. Exs. 6 and 7, R. 51, 53; 49) is executed by a defendant in disposition of a civil income tax claim, can such consent be used by the Government to establish the corpus delicti, even though the Court of Appeals held such evidence to be improper as not having any effect to convict a taxpayer on a criminal charge of evasion?

(5) Where the admissibility of Exhibits 6 and 7 (Consent to Waiver of Restrictions on Assessment and Collection of Deficiency in Tax, on Form 870, U. S. Treasury Department) (Govt. Exs. 6 and 7, R. 51, 53; 49) is held by the Court of Appeals to be clearly inadmissible (R. 315), and the contents of such exhibits are used by the Government throughout the trial, has substantial rights to a fair

and impartial trial under the **Sixth Amendment to the Constitution of the United States** been violated?

(6) When unofficial, unsigned documents (Govt. Exs. 18 and 19, R. 77, 79; 75) found in files of a City License Collector of the City of St. Louis, upon which a license fee to do business is paid, are used by the Government to prove admissions of amount of gross business done by a defendant, is the use of such documents, for such purpose, prejudicial and in violation of his rights under the **Sixth Amendment to the Constitution** to a fair and impartial trial?

CONSTITUTION, STATUTE AND RULES INVOLVED.

The Constitutional provisions involved are amendments V and VI:

"Article V:

"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

"Article VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be

informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Statute involved is **Section 145 (b) of Title 26, U. S. C.**, upon which this prosecution is based. The pertinent portion thereof reads as follows:

"* * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisonment for not more than five years, or both, together with the costs of prosecution."

The Rules involved are **Rules 7 (c) and 52 (a) (b) of the Rules of Criminal Procedure.** The pertinent provisions are as follows:

"Rule 7. The Indictment and the Information.

* * * * * * * *

"(c) Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * *

"Rule 52. Harmless Error and Plain Error.

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

STATEMENT OF THE CASE.

Petitioner, on June 16, 1952, was convicted in the United States District Court for the Eastern District of Missouri, on all five counts of an indictment charging him with having knowingly and wilfully attempted to defeat and evade the payment of income taxes for the years 1945, 1946, 1947, 1948 and 1949, by filing false returns for each of said years, in violation of Section 145 (b), Title 26, of the United States Code. The case was tried without the aid of a jury, and, upon a finding of guilty by the Court, sentence was imposed on June 26, 1952, of 18 months on each count, the sentences to run concurrently, and, in addition thereto, a fine of $4,000.00 under each count. Petitioner appealed in due course to the Court of Appeals for the Eighth Circuit, whose opinion was rendered March 19, 1954. Petitioner's petition for Rehearing was duly filed within the time prescribed by the Rules of the Court of Appeals, and was overruled, without opinion, by said Court on April 12, 1954.

Each count of the indictment followed the same pattern, first alleging that Joseph W. Clark, petitioner herein, did knowingly, wilfully and unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by him, by filing and causing to be filed a false and fraudulent income tax return, alleging that he understated the net income and the amount of income tax due and owing thereon, and that his net income for the calendar year, as set out in the indictment, was larger than the amount reported. Following these general allegations, each count of the indictment has added thereto the words "determined as follows:". Then follows the method employed by the Government in arriving at the understatements alleged, showing first the "Gross Receipts" of the business. From this was subtracted the "Cost of Goods Sold" and "Other Business Deductions" as each of these latter items

appeared on the income tax returns filed in each of the years, and in the exact amounts, with the exception, however, that in the year 1949 "cost of goods sold" was increased on account of one item not included in the defendant's income tax return for that year.

The indictment was filed on January 23, 1952 (R. 1). Prior to the filing of said indictment, Petitioner executed and filed with the Internal Revenue Agent in Charge in St. Louis, Missouri, on Form 870 of the United States Treasury Department, two Waivers of Restriction on Assessment and Collection of Deficiency in Tax. The first of such waivers was stamped "received" on December 4, 1951, and covered an individual civil liability for deficiencies in income taxes and penalties for the calendar years 1941 to 1947, inclusive (R. 51). The second of such waivers was stamped "received" on December 6, 1953, and covered a joint civil liability of petitioner and his wife, Hazel Clark, for deficiencies in income taxes for the calendar years 1948 and 1949.

The Government called as its first witness one Vincent S. Kerwin, Assistant Head of the Income Tax Department in the office of Collector of Internal Revenue for the City of St. Louis. He produced and identified, and there was offered in evidence, without objection, Government's Exhibits Nos. 1, 2, 3, 4 and 5, being income tax returns of the petitioner for the years 1945, 1946, 1947, 1948 and 1949, respectively (R. 13 through 47).

Witness Kerwin then produced and identified Government's Exhibits Nos. 6 and 7 as Waivers of Restrictions and Consent to Assessment, on form 870 of the United States Treasury Department, contained in the records of the Collector's Office (Govt. Exs. 6 and 7, R. 51, 53; 49). Upon objection to their offer in evidence, Government's counsel stated (R. 49): "We are offering those two exhibits to show there is a deficiency in tax, that there was

an understatement, which was caused by an understatement of net income, and we intend by other evidence to prove wilfulness. However, we are offering these two exhibits as to those years to show there was an understatement of income in this case, and that the defendant agreed that there was an understatement of income by signing these exhibits. Now, we are also offering the deficiencies for the years 1941 through 1944 therein charged to show intent. * * * It simply is more or less corroborative of the figures that will later show in our case." The Court overruled the petitioner's objection to the introduction of these exhibits (R. 50). Exhibits 6 and 7 appear at Record 51 and 53, respectively.

These exhibits were used as a basis of testimony of Government witnesses (R. 175, 176).

Petitioner requested the Court, pursuant to Rule 23 (c) of the Federal Rules of Criminal Procedure, to rule specifically upon the admissibility of these exhibits (Govt. Exs. 6 and 7, R. 51, 53, 280), but such request was not honored, the Trial Court stating that "The Court's finding of fact and the Court's opinion covers all that is necessary. * * *" (R. 287).

In the "Opinion of Court in Passing Sentence" (R. 287), the Court (at Record 290) commented on the deficiencies, not only in the indictment years, but also the deficiencies for prior years, as bearing on the question of intent.

The Court of Appeals ruled that these Exhibits should not have been received in evidence as having legal probative value, but under the effect of **Rule 52 (a), Federal Rules of Criminal Procedure, 18 U. S. C. A.**, petitioner was not entitled to a reversal for this error (R. 315).

After the introduction of several exhibits covering bank checks and bank statements, the Government called Sylvester J. Ash, Assistant Chief Clerk in the License Col-

lector's Office of the City of St. Louis, Missouri, who produced, in response to a subpoena served upon the License Collector, Government's Exhibits Nos. 18 and 19 (R. 77, 79; 75). Government Exhibit No. 18 (R. 77) was an undated, unsigned, typewritten statement on the billhead of Joseph W. Clark, headed "Gross amount of business July 1, 1948, to June 30, 1949." Government Exhibit No. 19 (R. 79), also on the billhead of Joseph W. Clark, dated August 10, 1950, directed to "License Collector's Office, St. Louis, Missouri," and headed "Statement for 12 months for 1949." This exhibit was also typewritten and unsigned. Neither exhibit shows any filing or recording stamp of the License Collector, or that it was prepared for any official purpose.

The witness read in evidence the ordinance of the City of St. Louis, which required the payment of a fee for carrying on the business of undertaker; for gross business in excess of $50,000.00 and less than $100,000.00, the fee was $100.00. The witness testified that no official form is required for a license, and that these exhibits are "merely placed in the file and left there" (R. 76).

The Government counsel, in offering the exhibits in evidence, made no statement concerning the purpose of the exhibits, and upon petitioner's objection to their offer on the ground that they had no probative value and materiality, the objection was overruled and the exhibits admitted.

These exhibits, clearly out of order in proof, as the testimony later developed, were used by Government witnesses throughout the trial as a basis for their conclusion that the Petitioner had understated his income. The District Court included the contents of these exhibits in its Findings of Fact (R. 292, 296).

The Court of Appeals determined that the Government had offered these exhibits as admissions on the part of the

Petitioner, and that their admissibility was discretionary with the trial court. The Court of Appeals bases its conclusion on the fact that (long after their introduction) there was read in evidence a sworn statement taken of petitioner, wherein he stated that he could not tell how he arrived at the figures on the exhibits. The Court of Appeals determined that the question was not as to the admissibility of their contents as official statements or records, but simply as to the sufficiency of their identification or authenticity as being statements of appellant.

The Petitioner is an undertaker in the City of St. Louis, Missouri. The record of funerals handled by him were kept in permanent volumes, dating back to his commencement of business in 1912. These funeral records contained all statistical data concerning the deceased and the charges made for the funeral (Illustrative pages from the Funeral Record Books appear at R. 83, 145, 149) (Govt. Ex. 22, R. 83; 82; page 224 of Def. Ex. A, R. 145; 228; page 225 of Def. Ex. A, R. 149; 228). As illustrated by Exhibit at R. 145, the complete funeral cost was $850.00, including casket and vault, one funeral car and two limousines. The total receipts from the funeral, however, were $1082.00, which included outlays for extra limousine, purchase of burial lots, opening grave, newspaper notices, and other items. The Government's computation used the total cost of funerals shown at the bottom of the page as the "Gross Receipts" in the indictment, even though it admittedly included advances made on behalf of the client, for which he would be reimbursed, and represented a return of capital (R. 148). In making up its total of "Gross Receipts," the Government used all payments received in each year, although many of such payments were for funerals handled in prior years.

The Petitioner announced ready for trial, on the theory that the sole question was "Were the gross receipts of his

business as an undertaker understated," no complaint having been made that there was any error in "Deductions," since these were accepted as filed.

The Government introduced 49 exhibits, many consisting of several pages, and one consisting of 37 pages. The record is replete with admissions by Government witnesses that return of cash advanced was included in the Government's computation of "Gross Receipts" which was treated as "Gross Income" for the purpose of determining taxable net income.

To establish its case, the Government attacked the petitioner's business expenses, claiming that deductions had been taken for the cash advances made on behalf of clients, and therefore these items must be included in "Gross Receipts." No examination of expenditures was made for any of the indictment years 1945, 1946, 1947 or 1948, or years prior thereto. An examination was made of expenditures for 1949, evidenced by Government Exhibit 36 (Govt. Ex. 36 reproduced in agreed "Volume of Exhibits" in lieu of reproduction in printed record—R. 124; 123), containing 37 pages. Although such examination disclosed that Petitioner had more deductions than claimed on the return, the deductions claimed were accepted as filed, the Government's analysis thereof not being used at all in determining the Petitioner's tax liability (R. 173).

The Government's contention expressed in a few words in the testimony of its principal witness, Revenue Agent Konrad Hartl (R. 152):

> "A. I made a spread of Mr. Clark's expenditures in 1949, which represented all of the items that he paid out in 1949.
>
> A. And whether he paid it out as an advance for somebody, or whether it was in connection with the

expenses of his business, he took credit for that on his 1949 return, and on the other hand, he was to include it in 1949 as receipt. * * * So the theory was there for 1949, and I applied the same theory in 1945."

Witness Hartl stated that in each of the years, all money received was picked up as receipts, and credit was given for the items of deductions as shown on the tax return (R. 152 et sub), and with no examination of expenditures in any year except 1949, and included in the cash receipts was the return of cash advances made on behalf of clients (R. 160). Hartl reasoned that the return of these advances or outlays was properly taken as income receipts because the Petitioner had told him he had a profit in them, but upon examination by the Court, he admitted that he had made no examination of the items to determine whether there was a profit made (R. 161).

The Court of Appeals, in its opinion, stated, that, although gross receipts cannot be called gross income, insofar as they consist of borrowings of capital, returns of capital, or any other items which Section 22 of the Internal Revenue Code has excluded from gross income, the Government was entitled to use these Gross Receipts as a convenient starting point of its method of arriving at Petitioner's Adjusted Gross Income, and assume the amount of the deductions shown on the return as being correct. The Court of Appeals says that the burden of proof is on the defendant to prove additional deductions.

Thus, the Court of Appeals creates a presumption in favor of the Government's determination of Adjusted Gross Income without proof of all the factors which make up the Adjusted Gross Income, imposing the burden on the defendant to overcome this presumption by proof, or suffer the consequences.

ARGUMENT.

The Rules of the Supreme Court provide that where the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, the Supreme Court may, in the exercise of its discretionary power to grant a review on writ of certiorari, exercise its power of supervision.

This petitioner asserts matters of importance on the question of the administration of criminal justice in the Federal Courts. Above and beyond any technical procedural rules, designed to preserve the rights of litigants, is the public interest in the maintenance of the Federal Courts as fair and impartial forums, where every litigation be fairly and impartially conducted and verdicts be rendered only on the issues made by the pleadings and the evidence. As Judge Rutledge said in **Kotteakos v. United States, 328 U. S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575:**

> "• • • it (the Government), too, has a stake with every citizen in his being afforded historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

With these admonitions in mind, a few points are herein urged which demonstrate that basic principles of justice and fair dealing, as well as fundamental rules of law and procedure, have been violated.

It Is Prejudicial Error and a Violation of Petitioner's Rights Under the Fifth and Sixth Amendments to the Constitution for the Government to Attempt to Prove That an Alleged Income Tax Evasion Was Committed in a Manner Distinct and Different From That Alleged in the Indictment, Where the Indictment Described the Particular Manner in Which the Alleged Income Tax Evasion Was Committed.

The indictment (R. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10) in this case is in five counts, covering the calendar years 1945, 1946, 1947, 1948 and 1949, respectively. Each count alleges an attempt was made by the defendant to defeat a large part of the income taxes due, by filing false and fraudulent income tax returns. The Government, in the indictment, then alleged that said attempted evasion was **determined** by taking Gross Receipts, subtracting Cost of Goods, as shown on the return, and further subtracting the business deductions, also as shown on the return.

The defendant announced ready for trial, on the theory that the sole question was "were the gross income receipts of his business an an undertaker understated, no complaint having been made that there was an error in deductions, since these were accepted as filed."

The Government then completely ignored the indictment, and undertook to prove, not that the "Gross Business Receipts" were understated, but that "Business Deductions" had been overstated. Naturally, in the light of the descriptive allegations in the indictment, the Petitioner was wholly unprepared to meet this proof, and practical prejudice resulted to him when such evidence was admitted over objections which brought these facts to the attention of the trial court.

Rule 7 (c) of the Federal Rules of Criminal Procedure provides that the indictment shall be a plain, concise and

definite written statement of the essential facts constituting the offense charged. The indictment constitutes the first pleading, and the issues are framed thereby and the evidence directed to them and to them alone. A trial is for the determination of issues, issues of a known subject, defining the position of the parties on the subject, eliminating the possibility of surprise, which may jeopardize the life and liberty of an accused.

In this case, the indictment was not cast in general terms as set out in the form suggested by the Supreme Court, but there is added which might be termed, and which the Court of Appeals determined to be, a bill of particulars, setting out the method by which the crime is alleged to have been committed. It is generally recognized that a bill of particulars might be amended during the trial to conform to the proof, but where the bill of particulars is a part of the indictment itself, no such amendment is possible.

The return of an indictment is the work of the Grand Jury alone—a coordinated branch of the court. As the Court, in **Naftiger v. United States (C. C. A. 8), 200 Fed. 494, 496,** said:

> "It is for that body, and for no other officer, to say what shall or shall not be charged, because the Fifth Amendment to the Constitution declares that 'no person shall be held to answer * * * for an infamous crime unless upon a presentation or indictment of the Grand Jury.' * * *"

So in this case, Petitioner came into Court to test the sufficiency of the allegations in the indictment, and the proof thereunder, that he had understated the "gross receipts" from his business. Where circumstances of person, place or thing are described with extreme (though unnecessary) particularity, such allegations must be proved

as laid. **United States v. Denny (C. C. A. 7), 165 Fed. (2) 668, 669, cert. den. 333 U. S. 844; Kutler v. United States (C. C. A. Pa., 1935), 79 Fed. (2) 440.**

The Petitioner proved upon cross-examination of the Government witnesses (R. 147, et sub) that included in the Government's "Gross Receipts" were items representing returns of capital in the form of cash outlays made on behalf of clients or customers. In other words, under the form of the indictment in this case, the Petitioner has been convicted for failure to report that which he was not required to report in the first place.

The record is replete with admissions by Revenue Agent Konrad Hartl of the manner in which the Government arrived at "Gross Receipts," and the items which he included therein. He testified time and time again that he determined "Gross Receipts" by taking the amount of payments on the total bill shown at the bottom of each page of the funeral record book (Def. Exs. A, B, C, D—original exhibits filed and not reproduced in printed record) (see illustrative pages R. 83, 147, 149), and added to that a schedule of paid items shown in a book marked "Journal" as receipts from limousines and burial of stillborns. He made no breakdown of the items which represented advances on behalf of customers for which the defendant would be repaid, although he admitted that the difference between the total charge and the basic charge could represent outlays or loans and advances made for the accommodation of customers. In each of the years, the return of cash advanced was included in the Government's computation of Gross Receipts, which was then treated as "Gross Income" for the purpose of determining taxable net income.

The Court of Appeals agreed that the method of Government's determination of net income was equivalent to a bill of particulars (R. 307), but failed to determine that

the Government was bound by such allegations. By so doing, the opinion is in direct conflict with that of the Court of Appeals for the Fifth Circuit in **Bryan v. United States, 175 Fed. (2) 223.** In the Bryan case, the indictment charged the defendant with willfully and knowingly attempting to defeat and evade a part of his income tax, the deficiencies determined being based upon an increase in net worth. The Government filed a bill of particulars, in which the gross income was alleged to have been understated. No claim was made that the deductions indicated in the income tax returns were unallowable, fictitious or false. The Court held that the proof must be measured by the bill of particulars, and that the conviction must stand or fall upon the proof or lack of proof of false statements knowingly made in the gross business receipts for the years in question.

To establish its case, the Government introduced 49 exhibits, many consisting of several pages, and one consisting of 37 pages. Numerous schedules were introduced in evidence covering bank deposit records, disbursement records, as well as a transcript of Defendant's books and records. Schedules were then made of the schedules, all presented for the first time at the trial, until even the Court finally stated that it was impossible to keep all the figures in mind, and requested counsel for the Government to furnish the Court and counsel for the Defendant copies of these schedules, so that it would be possible to follow the proof being submitted by the Government (R. 108, 109).

The theory of the Government is expressed by Government witness Hartl (R. 152) as follows:

> "A. And whether he paid it out as an advance for somebody, or whether it was in connection with the expenses of his business, he took credit for that on his 1949 return, and on the other hand, he was to include

it in 1949 as receipts. * * * So the theory was there for 1949, and I applied the same theory in 1945."

The Government witnesses contended that he included in Gross Receipts all items upon which he could earn an income, a profit (R. 161), but no attempt was made to show where a profit had been made on specific items, specifically limousines.

Government Agent Hartl made a spread of expenditures for 1949 alone, which represented all the items paid out in 1949 (R. 152), but his analysis was **not** used for the purpose of determining the Petitioner's tax liability (R. 173). The Petitioner was allowed to claim the expenses as they were shown on the tax return, and receipts were adjusted to include everything that came in, without examination of anything except expenses where records were available (R. 173).

The Court of Appeals in its decision (R. 306) endorses this procedure, and in effect has stated that although Gross Receipts are not the basis of income tax liability, because they may include return of capital as well as income, yet the Government had the right to use Gross Receipts, that is, everything that comes in, as a convenient starting point to arrive at the Adjusted Gross Income of the Petitioner. It therefore follows that regardless of the indictment with which the Petitioner was confronted, that his Gross Receipts were understated, it now develops that he was on trial for understating his Adjusted Gross Income. That position was first asserted on appeal.

The Court of Appeals has taken the position that, although Gross Income, and not Gross Receipts, is the basis of income tax liability, the Government can use any method to arrive at the net result, regardless of the allegations of the indictment (R. 309). It holds that the method used by the Government properly established the Petitioner's Adjusted Gross Income, in spite of the fact that

admittedly non-income items were included in the "Gross Receipts" used as "the starting point of its method of arriving at his (Petitioner's) Adjusted Gross Income," and no use was made of the analysis of expenditures for 1949 to determine the tax liability (no analysis being made for any other year), deductions being allowed as claimed on the return.

The Court of Appeals bases its logic upon the case of **U. S. v. Link, Third Circuit, 202 Fed. (2) 592, 593, 594,** stating that if the taxpayer has other deductions than those claimed in his return, the burden is upon him to show them and explain them as part of his defense. In the **Link** case, however, the Government had proved that there were large items of income omitted, and the Defendant in that case was undertaking to show that he owed no tax, because he had more deductions than those shown on the return.

Here there is no proof that anything more than Gross Receipts has been admitted, and there is no proof as to the gross income of the Petitioner. The Government witnesses have admitted that the gross receipts used in the computations of the Petitioner's income tax liability included items which are not income items at all, but they do not know how much of the item of Gross Receipts actually is gross income.

There was not cast upon him, as the Court of Appeals, in its opinion, has determined (R. 309), the burden of proving the accuracy of his Adjusted Gross Income. If Adusted Gross Income was the basis of the Government's determination of tax evasion, then not only is there an attempt by the Government to amend the indictment, but the Government has the burden of proving all of the items which make up the Adjusted Gross Income.

Since the Government in its indictment allowed the deductions as shown upon the return, it is to be presumed

that each and every item shown thereon as a deduction was a legally deductible item under the laws of the United States. If the deductions were not proper deductions, the allowance thereof was contrary to law, and the allowance of such deductions does not change into income those things which were not income in the first place.

In other words, it appears that the Government, being unable to prove an improper understatement of gross receipts, has undertaken to change the allegations of the indictment by proof upon which the crime is laid from one of understatement of gross receipts to one of an overstatement of deductions.

In **U. S. v. Fenwick** (C. A. 7), 177 Fed. (2) 488, the Court stated that the Government may not, having left gaps in his chosen method of proving unreported income, then have the burden of proof shift to the defendant so as to compel him to fill in these gaps or explain away the Government proof.

The Court of Appeals, in stating that the burden of proof in regard to the deductions claimed had shifted to the Petitioner herein, ignored its own opinion in **Kirsch v. U. S.** (C. A. 8), 174 (2) 595, 601. While that case involved the sufficiency of a hypothetical question, the facts here are similar to the extent that the Government admitted throughout that its "Gross Receipts" included items which were not income items at all, being returns of capital (R. 160), but also admitted that no effort was made to find out (R. 164, 165, 166). So clearly is the law stated in the **Kirsch** case the opinion could be adapted to the facts in this case without change. The court said:

> "But none of the foregoing considerations will justify the unqualified assumption of a fact as true that is known to be false. The hypothetical question assumed without qualification that all of the deposits

in the tavern account and in defendant's personal account constituted income for tax computation purposes. That assumption of fact was not only without evidentiary support even from permissible inference from proven facts, but was definitely disproved by the Government's own evidence. It is one thing for a party to say in effect, as was done in the Gleckman case, that he had exercised all of the means he reasonably could to determine how much of a bank account was income, had eliminated all that he could determine was not income, and was therefore assuming for the purpose of calculating taxes due that the remainder was income, and quite another and different thing to say in effect, as was done in this case—My evidence shows that all of these deposits were not income, but I do not know how much was not, I have made no effort to find out. So I am assuming that all are income and am casting the burden on the defendant to show, if he can, how much is not, or suffer the consequences. The latter procedure cannot be approved. It should never be necessary for the Government to negative a defendant's defense in a hypothetical question such as this. But it should always be necessary that the facts and circumstances put in evidence by the Government justify, by reasonable inference at least, the truth of the assumed fact. * * *"

The defendant announced ready for trial, prepared to defend himself under the allegations of the indictment returned—that he had understated his gross receipts—and that was the only accusation which he was prepared to meet.

The proof of the indictment and the matters which the Trial Court and the Court of Appeals have erroneously stated the Petitioner was obliged to defend so changed the issues presented by the indictment that there was substantial prejudice to the rights of the Petitioner and his

rights under the **Fifth and Sixth Amendments** to the Constitution.

The Admission of Unofficial, Unsigned Documents (Government's Exhibits 18 and 19) of the Office of the License Collector of the City of St. Louis, to Prove the Amount of Gross Business Done by the Petitioner Is Prejudicial, and in Violation of His Rights Under the Sixth Amendment to the Constitution.

The Government offered in evidence Government's Exhibit No. 18 and Exhibit No. 19 (R. 77, 79; 75). Both of these exhibits were found in a folder in the office of the License Collector of the City of St. Louis. Both were on the stationery of Joseph W. Clark, Funeral Director.

Government's Exhibit No. 18 (R. 77; 75) is undated and is addressed to no one, and has a heading on it "Gross Amount of Business from July 1, 1948, to June 30, 1949," following which is a typewritten statement for the last six months of 1948 and the first six months of 1949, with amounts set out opposite each month, the total showing $95,484.00. This exhibit is unsigned and bears no identification that it is an official record, or that it was filed in any office, or that it is a permanent record of any office, and does not indicate for what purpose said statement was made.

Government's Exhibit No. 19 (R. 79; 75) is likewise unsigned, it likewise carries no stamp showing it to have been recorded in any office, and does not appear to be an official document of any sort. This exhibit is dated August 10, 1950, addressed "License Collector's Office, St. Louis, Missouri," and bears the notation "Statement for 12 Months of 1949." Thereafter is set out the months of January to December, inclusive, without indicating the year involved, and opposite each month is set out a number of figures which total $87,493.00.

The Government introduced these two exhibits to show that the amounts shown on Government's Exhibit No. 19 (R. 79; 75) are the exact amount shown upon the income tax return of the defendant and to show that the amounts set out in Government's Exhibit No. 18 (R. 77; 75) for the first six months of 1949 differ from the figures set out in Government's Exhibit No. 19 (R. 79; 75) for the first six months of the same year.

It is to be noted that Government's Exhibit No. 18 (R. 77; 75) uses the expression "Gross Amount of Business, July 1, 1948, to June 30, 1949," while Government's Exhibit No. 19 (R. 79; 75) shows "Statement for 12 months for 1949."

There was read in evidence the ordinance covering licenses of funeral directors, which, among other things, provides that the fee for a funeral director shall be on a fiscal basis, and that for business done between the sums of $50,000.00 and $100,000.00, the fee shall be $100.00. It follows, therefore, that insofar as the license fee of this defendant is concerned, to carry on the business of a funeral director would be the same in either circumstance.

The defendant objected to the introduction of these exhibits, and objected very strenuously to any testimony in reference thereto, or any comparisons which were made to substantiate the Government's case. It would seem elementary that these exhibits have no probative value in this case, do not prove any issue involved in the case, are highly prejudicial, and surely violate the fundamental rule against hearsay. To admit evidence of such a nature tends to put a suspicious circumstance before the Court, and places a burden upon the accused of explaining the circumstance away, or else leave with the Court the impression that the accused has violated some other law which has no connection with this case at all. Such evidence tends to draw

the attention of the Court away from the consideration of the real issue on trial, to fasten upon it other questions, and tends to lead unconsciously to a decision on false issues, rather than the true issue at trial. Such evidence necessitates trial of matters collateral to the main issue, and forces the defendant to explain away, not proof of an offense upon which he has been indicted, but suspicious circumstances in connection with something entirely foreign thereto.

It is important to note that the Court's judgment in this case was based upon matters set out in these exhibits, and were considered the important factor in finding the defendant guilty. This is evident by the fact that in the Court's "Findings of Fact" (R. 292), at paragraph 19, it has found the report to the License Collector persuasive proof of understatement of defendant's income for the year 1949.

The Court of Appeals stated that the identification or authenticity of the exhibits as having been prepared by the Petitioner was a matter for the discretion of the trial court (R. 313), and that, being offered as admissions on the part of the Petitioner, that they were properly admissible. It is to be noted that these exhibits were introduced in evidence long before the Government made any attempt to prove the corpus delicti in the case (Govt. Exs. 18, 19, R. 77, 79; 75).

At an early stage in the trial, these exhibits put a suspicious circumstance before the trial Court, which the trial Court took into consideration in rendering its judgment against this defendant (R. 292), and the Court of Appeals likewise, in coming to its conclusion, was influenced to some extent, at least, by these exhibits.

When it appears, as it does here, that within the range of possibility the error may have affected the verdict, the defendant is not required to show that it in fact did so

(Little v. United States [C. C. A. 10], 73 Fed. [2] 861; Rice v. United States [C. C. A. 10], 149 Fed. [2] 601, 603). There can be no doubt that the introduction of these exhibits was erroneous and prejudicial to the defendant.

The Admissibility of Exhibits 6 and 7 (Consent to Waiver of Restrictions on Assessment and Collection of Deficiency in Tax, on Form 870, U. S. Treasury Department), Held by the Court of Appeals to Have been Erroneous, Affected Substantial Rights of the Petitioner and Was Prejudicial to His Rights to a Fair and Impartial Trial Under the Sixth Amendment to the Constitution.

The indictment in this case charged that the defendant willfully defrauded the Government of income taxes during the years 1945, 1946, 1947, 1948 and 1949 in sums totaling $47,128.40. In the trial below, when the Government Exhibits 6 and 7 (waivers) were originally introduced (R. 51, 53; 49), objections were made to their introduction. They were identified by the first witness called by the Government, and, at the time of their introduction, no testimony had been offered other than the identification and offer of the income tax returns for each of the years covered by the indictment. The objections were promptly overruled (R. 50), and the Government was permitted to introduce the exhibits in evidence as a part of the Government's case.

Further along in the Government's case (R. 114, 115, 116) use of the exhibits was again made by Government counsel, and again were duly objected to, and again the trial judge (R. 116), who was also the trier of the fact, overruled the objections.

Further in the case (R. 175, 176) the exhibits are again being used by the Government prosecutor as a part of the Government's case. Petitioner again objected, and is again overruled by the trial court (R. 176).

These exhibits (Govt. Exs. 6 and 7, R. 51, 53; 49) show that the Petitioner had agreed to a waiver of restrictions on assessment and collection of tax and penalties for the years 1941 through 1947 of $131,030.03 (Govt. Ex. 6, R. 51; 49), and for the years 1948 and 1949 of $13,370.19 (Govt. Ex. 7, R. 53, 49).

When objection was made to the offer, the Assistant United States Attorney gave as the grounds for their admissibility:

> "We are offering these two exhibits (6 and 7) to show that there is a deficiency in tax; that there was an understatement which was caused by an understatement of net income, and we intend by other evidence to prove willfulness. However, we are offering these two exhibits as to those years to show that there was an understatement of income in this case, and that the defendant agreed that there was an understatement of income, by signing these exhibits. Now, we are also offering the deficiencies for the years 1941 through 1944 therein charged to show intent" (R. 49).
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> • • • • • • • •
>
> "All that we are offering this for (Exhibits 6 and 7) is to show that the defendant at one time agreed to the figures that the agents are going to testify to; whether he at a later date in the course of this trial comes in and denies those are the right figures, or whether he has a suit for refund, I do not think it makes any difference. We are trying this before the Court for what it is worth in the trial of these issues. It simply is more or less corroborative of the facts that will later show in our case" (R. 50).
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> • • • • • • • •

Thus, it can be seen that within a few minutes after the trial commenced, the Petitioner was confronted with an alleged admission of a civil tax liability as an admission

of criminal guilt, designed to poison the mind of the trier of the facts from the beginning of the trial as to the guilt of the Petitioner, thereby covering up the other apparent weakness in the Government's testimony. This is one of the types of foul blows the Supreme Court must have had in mind when it gave its opinion in **Berger v. United States, 295 U. S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314.**

The Court of Appeals determined that the signing of such waivers was entitled to no effect to convict a taxpayer of a criminal charge against him (R. 315), but held that **Rule 52 (a) of the Federal Rules of Criminal Procedure, 18 U. S. C. A.**, the harmless error statute, applied. The Court of Appeals said that there was nothing in the proceedings to suggest that the Court in any way relied upon or attached weight to the waivers as a factor in its convicting of the defendant (R. 315). Petitioner suggests that there is nothing in the Court's finding of fact to indicate that the exhibits **did not** influence the court in arriving at the ultimate facts found.

Under the circumstances, Petitioner submits that without such a finding, the Court of Appeals in finding that no substantial rights of appellant were affected, either as a matter of process or result, ignore the directives of the Supreme Court in **Kotteakos v. United States, 328 U. S. 781, 66 S. Ct. 1125,** wherein it is said:

> "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were

not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phrase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Attention was drawn to these Exhibits (Govt. Ex. 6 and 7, R. 51, 53; 49) not only at the outset of the case, but throughout the trial, even to the time of passing sentence.

The Petitioner's Motions for Acquittal at the close of the Government's case (R. 211) and the entire case were overruled (R. 279), and the Court, sitting without the aid of a jury, announced its ruling, finding Petitioner guilty of each of Counts 1 to 5, inclusive (R. 279). Imposition of sentence was deferred to June 26, 1952. Petitioner was released on existing bond until that date.

Petitioner's request for findings of fact was filed and submitted (R. 279). The request for findings of fact was filed pursuant to **Rule 23 (c) of the Federal Rules of Criminal Procedure**, and item 8 thereof (R. 281) is as follows:

"That Exhibit 6 of the United States of America, being Form 870 of the United States Treasury Department, headed 'Waiver of Restriction on Assessment of Taxes' for the years 1945, 1946 and 1947, is admissible in evidence, to show willfulness on the part of defendant herein."

Request for finding of fact (R. 28, item 9):

"That Exhibit 7 of the United States of America, being Form 870 of the United States Treasury Department, headed 'Waiver of Restriction on Assessment of Taxes' for the years 1948 and 1949 is admissible in evidence, to show willfulness on the part of defendant herein."

Although specifically requested to do so, District Judge Moore, who tried the case without a jury, declined to comment upon the admissibility or inadmissibility of Government Exhibits 6 and 7 (R. 51, 53; 59) in the findings of fact requested and required under **Rule 23 (c) of the Federal Rules of Criminal Procedure** (R. 292, 296).

These Exhibits (Govt. Exs. 6 and 7, R. 51, 53; 49) were not a minor part of the case, but the truth of the matter is that the indictment itself was based upon them. Nor is it true that they were only in the trial at one point of the case. They were in the case not only from the indictment, but also throughout the case (R. 49, 50, R. 114, 115, 116, R. 175, 176) and, at the conclusion of the case. When District Judge Moore, the trier of the fact, pronounced sentence, he called before the Court, Agent Dale, and before pronouncing sentence, asked Agent Dale (R. 290) just how much did the defendant defraud the Government of during the years 1945 through 1949. The answer of the agent was the exact total of the deficiencies shown on Government's Exhibits 6 and 7 (R. 51, 53; 49) for those years.

Thus it can be seen that Government Exhibits 6 and 7 (R. 51, 53; 49) not only formed the basis for indictment, not only formed the basis for conviction, but formed a definite basis upon which the Trial Court passed sentence.

When the whole record in the case is searched (and these Exhibits [Govt. Exs. 6 and 7, R. 51, 53; 49] were a part of the entire record), there can only be one logical conclusion regarding these two Exhibits (Govt. Exs. 6 and 7, R. 51, 53; 49), and that conclusion is that they formed a substantial part of the Government's case, and proof against this Petitioner on all of the five counts upon which he was indicted and convicted.

The record of the trial (R. 175) shows that Government Exhibit 6 (R. 51; 49) was used by the Government to show

understatement of income in the years 1941 through 1944, and to prove intent (R. 50). Those years were not even in the indictment return. The Trial Court likewise felt that understatement in these years evidenced intent (R. 290).

It is fundamental in our Code that an accused be given a fair and impartial trial. By no stretch of the imagination can it be said that this defendant had a fair trial, when improper evidence is the basis and foundation of the indictment; when improper evidence is the basis and foundation of the conviction; and when improper evidence is the basis and foundation for sentence after conviction.

CONCLUSION.

The Petitioner submits:

(1) The decision herein sustains the conviction under a charge differing from that returned by the Grand Jury, and violates his rights under the **Fifth** and **Sixth Amendments** to the Constitution, or at least constituted such fundamental error that it must not be permitted to stand.

(2) The decision herein is at variance and in conflict with the decisions of the Fifth Circuit in **Bryan v. U. S., 175 Fed. (2) 223**, the decision of the Seventh Circuit in **U. S. v. Fenwick, 177 Fed. (2) 488; U. S. v. Denny, 165 Fed. (2) 668, cert. den. 333 U. S. 844**, as well as the decisions of the Eighth Circuit in **Brown v. U. S., 146 Fed. 219**, and **Kirsch v. U. S., 174 Fed. (2) 595.**

(3) The Court of Appeals ruling, in disregarding the errors of law committed by the trial court in the admission of evidence, appears to be directly in conflict with **Kotteakos v. U. S., 328 U. S. 781, 66 S. Ct. 1125.**

(4) That the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial court, as to call for an exercise of this Court's power of supervision.

(5) The decision of the Court of Appeals raises a serious question of the administration of criminal justice in the Federal Courts.

Prayer.

Wherefore, Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the proceedings of said Court herein, being case numbered and entitled in its docket as

Joseph W. Clark,
Appellant,
v.
United States of America,
Appellee.
} No. 14,652.

and that the judgment of said Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated May 7, 1954.

JOSEPH W. CLARK,
Petitioner,

By .....
DON O. RUSSELL,

.....
ROBERT J. CALLAHAN, JR.,
Attorneys for Petitioner.

Certificate of Counsel.

We hereby certify that in our judgment the foregoing Petition is well founded, and that it is not interposed for delay.

Dated May 7, 1954.

.....

Don O. Russell,

.....

Robert J. Callahan, Jr.,

Attorneys for the Petitioner and Members of the Bar of this Court.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and rule involved	3
Statement	4
Argument	12
Conclusion	19

CITATIONS

Cases:

Burka v. *Commissioner*, 179 F. 2d 483	15
Burnet v. *Logan*, 283 U.S. 404	14, 15
Doyle v. *Mitchell Brothers Co.*, 247 U. S. 179	14, 15
Metropolitan Life Ins. Co. v. *Armstrong*, 85 F. 2d 187	17
Southern Pacific Co. v. *Lowe*, 247 U. S. 330	14
United States v. *Hornstein*, 176 F. 2d 217	15
United States v. *Link*, 202 F. 2d 592	15
Wausau Sulphate Fibre Co. v. *Commissioner*, 61 F. 2d 879	17

Statute:

Internal Revenue Code, Sec. 145 (26 U.S.C. 145)	3

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 52	3
VII Wigmore, Evidence (3d ed., 1940):	
Sec. 2128	18
Sec. 2148	18
Secs. 2158-2160	18

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 71

JOSEPH W. CLARK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 306-315) is reported at 211 F. 2d 100. The District Court's special findings of fact (R. 292-296) have not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1954 (R. 315-316), and the petition for rehearing was denied on April 12, 1954 (R. 323). The petition for a writ of certiorari was

filed May 10, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

Petitioner was indicted for wilful evasion of income taxes. The indictment, accepting as correct the deductions claimed in petitioner's returns, alleged that he had understated the gross receipts of his undertaking business. The proof showed that he had claimed numerous "outlays" as deductions, that he had been repaid for these "outlays" and had even made some profit on them; but that he had not included these payments in his gross receipts in his returns. The questions presented are:

1. Whether there was a variance between indictment and proof.

2. Whether Government's Exhibits 18 and 19, being statements of gross business receipts filed with the License Collector of the City of St. Louis, were properly admitted as admissions against interest.

3. Whether the admission of Government's Exhibit's 6 and 7, being waivers of restrictions on the collection of income tax deficiencies in the amounts determined by the Government, constituted reversible error.

STATUTE AND RULE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 145.)

Federal Rules of Criminal Procedure:

RULE 52. HARMLESS ERROR AND PLAIN ERROR.

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

* * * * *

STATEMENT

On January 23, 1952, a five-count indictment was filed against petitioner in the United States District Court for the Eastern District of Missouri charging him with wilful attempts to defeat and evade a large part of his income taxes for the years 1945 to 1949, inclusive, in violation of Section 145 (b) of the Internal Revenue Code. (R. 1-9.) Trial by jury was waived (R. 11), and after trial by the court petitioner was found guilty on all five counts (R. 279). On June 26, 1952, he was sentenced to concurrent terms of imprisonment for eighteen months on all counts, and a fine of $4,000 was imposed under each count. (R. 291-292, 296-297.) The Court of Appeals affirmed the judgment. (R. 316.)

Each count of the indictment alleged that petitioner knowingly understated the amount of his net income and specified the manner in which the correct net income had been determined by the Government. The starting point of this computation was a figure representing the gross receipts from petitioner's business. From this figure deductions were allowed for cost of goods bought for sale and other business deductions (salaries, taxes, depreciation, rent, repairs and "other expenses"). The resulting figure represented both the net profit from petitioner's business and his adjusted gross income.[1] From this figure the standard deduction

[1] According to the returns petitioner's undertaking business was his only source of income. (R. 13-47.)

allowed for personal expenses was then subtracted to arrive at petitioner's net income. (R. 1-9.) The deductions allowed were the same as those claimed by petitioner in his returns. (R. 15, 21-23, 27, 31, 35-39, 43-47.)

The evidence to support the verdict may briefly be summarized as follows:

(a) *Petitioner's Business Records.*—Petitioner is an undertaker and the chief records of the business receipts were a set of funeral record books. (R. 82, 191-192, 199-200, 227.) Each numbered page in these books recorded the data pertaining to a single funeral. Each page was divided roughly into three parts: a left side containing data as to the deceased; a right side detailing the charges; and a box at the bottom listing the dates and the amounts of payments. (R. 85, 143-151, 156-157, 164-166, 199, 227.) Only the right side and the bottom box concern us here. Three sample pages have been reproduced in the printed record.[2] (R. 83, 145, 149.)

The first item at the top of the charge side reads, "Complete Funeral (except outlays)." The amount entered in the column at the extreme right represented the basic charge for the funeral. (R. 83, 85.) Beneath this appear approximately forty specific items. When one of these items was covered by the

---

[2] Volumes 12, 13 and 14 of this set, recording funerals from November 24, 1943, to September 16, 1950, were introduced in evidence as Defendant's Exhibits A, C, and E. (R. 227, 228, 229, 234.)

basic charge the expense to petitioner therein was not extended to the charge column on the extreme right. But if the expense involved represented an advance, or "outlay," which was not included in the basic charge and for which petitioner expected reimbursement, the amount was extended to the charge column. Among these "outlay" items were cemetery lots, cemetery service, newspaper death notices, extra limousines, and fees to clergymen, singers and organists. The last important item on this side reads, "Total Footing of Bill." The amount entered here was the sum of the basic charge plus the "outlays," and it represented the total charge to be collected by petitioner. (R. 83, 85, 143-151, 156-157, 164-166, 199, 227.)

In the box at the bottom the dates and the amounts of the various payments were recorded. When the final installment had been received the total payment was entered and the page was stamped "paid." (R. 83, 85, 143-151, 156-157, 164-166, 199, 227.)

In addition to these funeral record books, petitioner kept a cash receipts book, a journal recording receipts from ambulance and limousine hire and from stillborn cases, and a loose-leaf book recording receipts from hearse loans to other undertakers. (R. 87-101, 192-194.)

There were no original records of expenditures except some invoices, and bank statements and check stubs relative to four bank accounts for 1949 and part of 1948. (R. 116-131, 151-171, 192.)

(b) *Petitioner's Computation of Net Income in his Returns.*—In his returns (R. 13-47) he computed his net income in the following manner: starting with a figure representing the gross receipts from the business he subtracted the cost of goods bought for sale and other business deductions (salaries, interest, taxes, depreciation, rent, repairs and "other expenses") to determine his net profit from the business (R. 15, 21, 27, 35, 43). Since he had no other income this profit was also his adjusted gross income, from which he then subtracted the standard deduction in order to arrive at his net income. (R. 23, 31, 39, 47.)

In each return the deduction for "other expenses" was explained by a detailed schedule. (R. 15, 21, 35-37, 43-45.) It will be noted that many of the items in these schedules were recorded in the books as "outlays". (R. 145, 149.)

Petitioner's returns reported the following gross income from the business, deductions, adjusted gross income, and net income computed thereon (R. 15, 21, 23, 27, 31, 35, 39, 43, 47, 105, 111):

Year	Gross Income	Deductions	Adjusted Gross Income	Net Income
1945	$34,874.00	$31,436.08	$ 3,437.92	$2,937.92
1946	62,950.00	57,026.76	5,923.24	5,423.24
1947	86,372.00	78,873.66	7,498.34	6,998.34
1948	84,946.00	78,081.40	6,864.60	6,178.14
1949	87,493.00	77,111.33	10,381.67	9,381.67

(c) *Evidence Produced at the Trial.*—On August 16, 1950, when Agent Hartl began an audit of petitioner's books and returns, he was told by petitioner that the funeral record books were the only

records used in the preparation of his income tax returns (R. 82), and that they correctly set forth all the receipts from the funeral business (R. 85). Petitioner told Hartl that his books were kept and his returns were prepared on a cash basis, and the agent's examination satisfied him that this was so. (R. 86, 142.) Hartl, therefore, set out to determine petitioner's total cash receipts for the years from 1945 to 1949, inclusive. During these years some money was collected for funerals held in years previous to 1945, so the agent first went back through the book as far as 1940 to determine this amount. He then took the books from 1945 through 1949 and determined the total cash receipts recorded therein. (R. 82-87.)

In determining the Gross Receipts for each year the agent took the total payment recorded in the box at the bottom of each individual funeral record page.[3] (R. 85-87, 147.) In so doing he included in the gross receipts cash received by petitioner as reimbursement for the "outlays" advanced on behalf of his customers. (R. 147, 151, 152, 153, 155-157, 160, 164, 166.) The agent included these "outlay" receipts in the gross receipts, because, as noted above, petitioner had included the "outlay" expenditures he made during the year among the business deductions claimed on his return. In this particular case the agent thought it proper to include the "outlay" receipts in his computation of

[3] Of course, there were instances, particularly at the end of 1949, where payments had not yet been completed. In such cases the agent took the amount paid to date. And in the years prior to 1945, the agent took only those payments made after January 1, 1945.

gross receipts (instead of simply disallowing the amounts expended by petitioner on "outlays" as improper deductions), because petitioner admitted to him that he sometimes actually made a profit on "outlays", and because it was impossible to determine the amount of this profit since petitioner had no check stubs, cancelled checks or bills to show the amount he expended on "outlays" except for the year 1949 and part of 1948.[4] From an examination of the records of petitioner's expenditures for 1949 the agent determined that he had claimed "outlay" expenditures in addition to all other business expenditures as deductions in his 1949 return. He reasoned that if petitioner claimed his "outlay" expenditures as business deductions in 1949 he should have included his "outlay" receipts among his gross receipts, and in the absence of records of expenditures for the other years he applied the same theory there. (R. 123-124, 152-166, 171, 176-188.)

After he had been working on the case for some time the agent learned of the existence of the cash book, the journal of receipts from ambulance and limousine hire and stillborn cases, and the loose-leaf record of hearse receipts. He used these also in determining gross receipts.[5] (R. 87-102.)

In determining petitioner's business expenses the agent was handicapped by the lack of records

[4] Petitioner told the agent that old bank statements and cancelled checks has been destroyed. (R. 116.)

[5] The agent also discovered a few instances in which petitioner had received commissions from a cemetery for bringing a family to the cemetery for the purchase of a lot. (R. 57-63, 102.)

just noted. He, therefore, allowed petitioner all the deductions he claimed on his returns. (R. 105-114, 148, 151, 155, 157-158.) Since he had the check stubs for 1949 he examined those, and finding that petitioner had understated his expenses by $4,675 for that year he gave him credit for that amount. (R. 114, 159, 171-172, 174, 188-190.)

Agent Hartl made an analysis of petitioner's check stubs for 1949. This was introduced in evidence to show that petitioner had claimed all of his business expenditures for 1949 as deductions in his return, and to show what he had expended as capital outlays and for personal items. (R. 114, 116, 123-124.) During the year he spent $21,432.61 for capital items, reduction of liabilities, federal income taxes, charitable donations and personal living expenses, although he reported a net income of only $9,381.67. (R. 127-132; see Ex. 38, R. 129.)

On the basis of all these records the agent computed petitioner's gross receipts for the years involved. (R. 86-105; see Ex. 33, R. 103.) Allowing deductions on the basis of the returns and the 1949 check stubs he then computed petitioner's correct adjusted gross income and net income. (R. 105-114; see Ex. 34, R. 111.) The following table shows the result:

Year	Gross Receipts	Deductions	Adjusted Gross Income	Correct Net Income
1945	$78,745.06	$31,436.08	$47,308.98	$46,808.98
1946	87,793.95	57,026.76	30,767.19	30,267.19
1947	92,195.97	78,873.66	13,322.31	12,822.31
1948	102,321.36	78,081.40	24,239.96	23,239.96
1949	108,023.02	81,786.33	26,236.69	25,236.69

During the investigation petitioner made a statement to the agents under oath. He could not explain the deficiencies; he could not explain how he had arrived at the figures used in his returns; he could not explain the conflicting figures in two reports he had submitted to the License Collector. He admitted that he had never reported income from stillborns, ambulance and hearse hire, and cemetery commissions. He could not account for the disposition of the unreported income, except to say that he had spent it.[6] He never asked his accountant for advice in connection with the figures he gave the accountant each year for preparation of the return. (R. 198-210.)

In December 1951 petitioner signed a form in which he waived the pertinent restrictions of the Internal Revenue Code and consented to the collection of the deficiencies in his income taxes as determined by the agents.[7] (R. 49-53, 114-116, 175; Exs. 6 and 7, R. 51 and 53.)

At the trial petitioner took the stand and identified his records. (R. 227-234.) On cross-examination he admitted that he had made a profit on stillborns and limousine hire; that he had reported his "outlays" to other undertakers for extra limousines as expenses; but that he had not reported as income

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[6] The unreported income from 1941 to 1949, inclusive, amounted to around $200,000. At the time of the investigation petitioner's net worth was, so far as the agents could discover, around $150,000. (R. 205, 207.)

[7] The agents discovered deficiencies in the years as far back as 1941 and these earlier years were included in the waiver and consent. (R. 51-53, 175.)

the money he received in return from customers. (R. 235-247.) He said that he supposed or believed that, in adding up his gross receipts to give to his accountant each year, he took the basic charge figuring from the top of the pages of the funeral record book, but he admitted that he had often told the agents during the investigation that he did not know where he got the figures from, and he admitted that he was trying to give his accountant the gross total of the money he had collected during the year and that he was not giving him charges until they had been collected. (R. 247-251.)

ARGUMENT

1. In his first contention (Pet. 14-22) petitioner appears to have taken two contradictory positions. On the one hand he argues (Pet. 14-15, 17, 20) that the Government charged that he understated his gross receipts but then undertook to prove that he overstated his deductions. On the other, he urges (Pet. 16-20) that the Government never properly established his gross income, the basis upon which income tax liability must be computed. This latter branch of the argument runs somewhat as follows: income tax must be determined on the basis of gross income, i.e., receipts which constitute increment or gain as distinguished from receipts which simply constitute returns of capital "outlays"; but, the Government started with gross receipts, including therein all annual receipts whether income or return of capital; and the Government never determined petitioner's gross in-

come because it made no attempt to exclude his capital "outlays" from the gross receipts with which it started; therefore the Government's computation of net income rests upon an improper basis, is inaccurate, and affords no support for a finding that petitioner understated his net income in his returns. There is no merit in either branch of the argument.

The indictment charged that petitioner attempted to evade his income taxes by understating his net income in his returns. It further specified that the computation had been made by taking petitioner's gross receipts, subtracting the business deductions claimed in his returns to obtain gross income, and then subtracting nonbusiness deductions as claimed to obtain net income. The proof revealed that petitioner used the same method of computation in his own returns. (R. 13-47.) But the returns also revealed that petitioner had claimed deductions for such items as newspaper death notices, cemetery lots, ambulance service, etc., and the proof established that petitioner had derived some profit from these "outlay" expenditures and pointed inevitably to the fact that he had reported neither this profit nor the return of the original "outlays" among his gross receipts. The Government was not attempting to prove that the deductions claimed by petitioner for the "outlays" were improper. The Government's theory was that, since a profit had been made, the "outlays" were proper business

expenses and the entire amount received in return should have been included in the gross receipts.[8] (See R. 151-166.) It is clear, therefore, that the Government both alleged and proved an understatement of gross receipts.

Furthermore, the Government determined gross income in a proper manner. It is quite true that "gross receipts" is a broader term than "gross income." All returns of capital must be excluded from the former to obtain the latter, and the tax must be based on gross income alone. *Southern Pacific Co.* v. *Lowe,* 247 U.S. 330, 335. This Court said in *Burnet* v. *Logan,* 283 U.S. 404, 413 (quoting from *Doyle* v. *Mitchell Brothers Co.,* 247 U.S. 179, 185):

> In order to determine whether there has been gain or loss, and the amount of the gain, if any, we must withdraw from the gross proceeds an amount sufficient to restore the capital value that existed at the commencement of the period under consideration.

But this is exactly what the Government accomplished by its computation. The agent first took the gross receipts, including therein all amounts received in reimbursement for the "outlays". He did this because petitioner admitted that he had made a profit on some of these "outlays", and because he could not check "outlay"

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[8] On cross-examination Agent Hartl said that *if* this theory of the Government was wrong, *then* petitioner had claimed deductions to which he was not entitled. (R. 152.)

expenditures against "outlay" receipts since all records of expenditures were destroyed except for 1949 and part of 1948. The agent then subtracted business expenses from the gross receipts. In so doing he allowed petitioner all the deductions he had claimed as the result of "outlays" paid out in behalf of customers. In the absence of any records of expenditures the Government was certainly justified in relying on the figures in petitioner's returns. *Burka* v. *Commissioner,* 179 F. 2d 483, 485 (C.A. 4th); *United States* v. *Link,* 202 F. 2d 592, 593-594 (C.A. 3d); *United States* v. *Hornstein,* 176 F. 2d 217, 220 (C.A. 7th). Subtracting business expenses from gross receipts the Government obtained petitioner's annual gross income. From this the standard deduction was substracted in order to obtain net income. Clearly, if any return of capital was included in the amount of gross receipts, it was withdrawn, in accordance with the rule of the *Burnet* case, from the amount representing gross income before the annual tax was computed. Whether the "outlay" receipts be regarded as return of capital or an income is immaterial. They were simply cancelled out. As this Court said in an analogous situation (*Doyle* v. *Mitchell Brothers Co., supra,* p. 188):

> It may be observed that it is a mere question of methods, not affecting the result, whether the amount necessary to be withdrawn in order to preserve capital intact should be deducted

> from gross receipts in the process of ascertaining gross income, or should be deducted from gross income in the form of a depreciation account in the process of determining net income. In either case the object is to distinguish capital previously existing from income taxable under the act.

Petitioner complains (Pet. 18) that the Government made no proper audit of his expenditures. But where records of expenditures were available for an entire year in the form of check stubs, for the year 1949, Agent Hartl carefully transcribed, classified, and analyzed them. The results of this examination (Ex. 36 and 38) were introduced to prove that petitioner had actually claimed all the "outlay" expenditures as deductions on his return and to prove wilfulness by showing that his non-deductible expenses for the year were considerably in excess of his reported net income (R. 123-124). The agent's analysis showed petitioner's expenses to be $74,398.42, whereas he had reported the practically identical figure of $73,-648.79 in his return (R. 188); and since the difference was negligible the agent took the figure in the return in order to be consistent in his treatment of all the years involved (R. 171-172). The agent also discovered that petitioner had spent $21,432.61 on non-deductible items while reporting a net income of $9,381.67.

2. Petitioner complains (Pet. 22-25) of the admission of two statements taken from the files of

the City of St. Louis License Collector relating to his application for an undertaker's license. Exhibit 18 shows one set of figures for petitioner's gross business receipts for the months from January to June 1949. Exhibit 19 shows a lesser set of figures for the same months; these latter figures are exactly the same as those which petitioner had given to his accountant for preparation of his 1949 returns; and Exhibit 19 is dated just six days before Agent Hartl paid his first visit to petitioner. The Government showed that petitioner was required by ordinance to submit such a statement of gross receipts to obtain a license; that he did obtain a license; that the statements were typed on his stationery; and that he had admitted filing them. (R. 72-81, 195-197, 201-202.)

Petitioner's argument is without substance. In the first place, the relevance of the exhibits is obvious, for the difference between the two sets of figures showed that petitioner knew that his true income was in excess of that shown in his returns, and the filing of the second set indicated an attempt to cover up. Moreover, the exhibits were not introduced by the Government as official documents, but on the theory that they were admissions. The question of their admissibility depended, therefore, on the evidence connecting them with petitioner; and this is a matter which rests within the sound discretion of the trial court. *Metropolitan Life Ins. Co.* v. *Armstrong,* 85 F. 2d 187, 193-194 (C.A. 8th); *Wausau Sulphate Fibre Co.* v. *Com-*

missioner, 61 F. 2d 879 (C.A. 7th); VII Wigmore, Evidence (3d ed., 1940), Secs. 2128, 2148, 2158-2160. The evidence was clearly sufficient to justify the conclusion that petitioner had filed the statements himself.

3. Equally without merit is petitioner's final contention (Pet. 25-30), in which he urges that his right to a fair trial was substantially affected by the admission of the waivers in which he dispensed with the 90 day delay between notice of deficiency and assessment and collection of income tax deficiencies in the amounts determined by the Government. (Exs. 6 and 7, R. 49-53, 111, 114-116, 175-176.) Even assuming the probative value of such waivers was slight, it is clear that they played no part in the ultimate judgment of conviction. The understatements of net income were overwhelmingly demonstrated by the Government's other evidence, and these exhibits were merely cumulative and corroborative. Furthermore, as the opinion of the Court of Appeals points out (R. 315), this case was not tried by a jury, and it is clear that the exhibits had no effect on the trial judge's decision, for he not only did not mention them in his findings of fact (R. 292-296), but he actually refused a specific request by defense counsel to include a finding which would have indicated that he had placed some reliance on them (R. 281, 287).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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